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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 214

PHILLIPS & BUTTORFF CORPORATION,
Petitioner,

vs.

W. RAYMOND DENNEY et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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To the United States Court of Appeals for the Sixth Circuit.

Petitioner, Phillips & Buttorff Corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, in its Docket No. 15491, decided May 8, 1964, and captioned

W. Raymond Denney, et al., Petitioner, v. Phillips & Buttorff Corporation, Respondent-Appellant, wherein that Court affirmed the judgment of the District Court for the Middle District of Tennessee.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix A hereto) has not yet been officially reported.

The statement of the District Court from the bench, by District Judge Miller, and the judgment of the District Court, will be found at pages 101a and 109a, respectively, in the Appendix of the Respondent-Appellant filed in the United States Court of Appeals for the Sixth Circuit in No. 15491. This same Appendix contains the Findings of Fact and Conclusions of Law by the District Court, and Opinion by the Sixth Circuit, in the earlier cause, **Maggiore v. Bradford**, out of which the present cause arose. They are at pages 13a and 23a, respectively.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 8, 1964. The jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1254.

QUESTION PRESENTED.

The question here presented for review is whether the Circuit Court of Appeals for the Sixth Circuit in its decision violated the Act of Congress passed June 25, 1948, commonly known as the "Rule of Decision" law, 28 U. S. C. A. 1652, by failing to apply applicable Tennessee law where, although the original plaintiff stockholders'

suit had resulted in recovery for the corporation of a fund of only $40,800.00, the Court nevertheless approved the award of attorney's fees in the amount of $235,000.00, and expenses of $6,227.98.

FEDERAL STATUTE INVOLVED.

The Act of Congress, June 25, 1948, 62 Stat. 944, 28 U. S. C. A. 1652, is as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT.

This is an ancillary proceeding growing out of an earlier stockholders derivative action, **Maggiore, et al. v. Bradford, et al.**, 310 F. 2d 519 (Included at page 23a of the Appendix filed in the Court of Appeals by Respondent-Appellant). There the plaintiffs had sought to rescind a transaction in which the present petitioner, Phillips & Buttorff Corporation, had acquired from its controlling stockholder 60,000 shares of the stock of William R. Moore Dry Goods Company for Two Million Seven Hundred Thousand ($2,700,000.00) Dollars, or Forty-Five ($45.00) Dollars per share. Before trial the directors of Phillips & Buttorff sold the Moore stock for cash at the same price at which it had been purchased, i.e., Forty-Five ($45.00) Dollars per share.

Thereupon on petition of plaintiffs' counsel, the District Court impressed a lien on the assets of the corporation for attorneys' fees for plaintiffs' counsel, and the plaintiffs

filed an amended complaint seeking recovery of certain alleged operating losses. This left for consideration on the trial consideration of the allowance of attorneys' fees, alleged operating losses, and the right to receivership.

The District Court denied all of the relief sought and dissolved the lien to secure possible fees. It held that the sale of the Moore stock had been "a bona fide sale for business reasons and was not an attempted compromise of the pending litigation without the approval of the Court" (20a); that "the stock was sold for business reasons without regard to the suit"; and that the Moore stock "was fairly valued at Forty-Five ($45.00) Dollars a share" (20a), and that "There was no evidence that the price to the Foundation of $45.00 per share exceeded its fair market value" when the sale took place (22a).

The Court of Appeals did not disturb these findings, but it did hold that the original transaction had been constructively fraudulent. It also held that depriving Phillips & Buttorff of its cash and liquid securities and requiring it to borrow money to finance the purchase of the Moore shares had "operated to the prejudice of P & B and its minority shareholders" (27a). It recognized that the Forty-Five ($45.00) Dollars price paid for the Moore shares had been found by the District Judge not to be unfair or oppressive (25a) and it has not at any time questioned this valuation. It remanded the cause to the District Court with instructions that judgment be entered for interest on the Two Million Seven Hundred Thousand ($2,700,000.00) Dollars from the date of the commencement of the action to date of the sale of the stock, and that attorneys fees be determined. It did not reverse the findings of the District Court as to either the value of the stock or the existence of business reasons for the sale of the stock.

The District Court entered judgment for interest in the sum of Forty Thousand Eight Hundred ($40,800.00) Dollars, and this was the sole and only amount at any time recovered in these proceedings for the benefit of the corporation or its stockholders.

Nevertheless, the District Judge found that the attorneys were entitled to fees in the amount of Two Hundred Thirty-Five Thousand ($235,000.00) Dollars plus expenses totaling Six Thousand Two Hundred Twenty-Seven and 98/100 ($6,227.98) Dollars.

On appeal by the present petitioner to the Sixth Circuit, that Court sustained the fee determination, and in doing so said, contrary to the earlier finding of the District Court, which had not been upset on the first appeal:

> "It cannot be said that the cancellation of the purchase of the Moore stock did not result from the action of the minority stockholders. Its cancellation inured to the benefit of the corporation by restoring $2,700,000.00 in assets in lieu of the Moore stock."

The opinion does not take cognizance of the fact that the Moore stock which the corporation gave up to acquire the Two Million Seven Hundred Thousand ($2,700,000.00) Dollars had been found to be worth Two Million Seven Hundred Thousand ($2,700,000.00) Dollars, and that in effect the net result of the sale of the stock was nothing more than the substitution of cash for stock of equal value.

The opinion recognized the corporation's claim that under Tennessee law the fees allowed were necessarily limited by the amount actually recovered, i. e., the Forty Thousand Eight Hundred ($40,800.00) Dollars, but it

differed with this contention, cited one other Tennessee case, and said:

> "In support of this theory, counsel cite **Southern v. Beeler, Atty.-Gen.**, 183 Tenn. 272. More relevant to the issue in this case is **Grant v. Lookout Mountain Co.**, 93 Tenn. 691. There the court held that since the minority stockholders by their action had benefited the corporation, it was therefore responsible for proper and reasonable attorney's fees. The court further determined that the attorneys were entitled to a lien for their fees upon the land conveyed by the deeds which were canceled by the action of the minority stockholders."

REASONS FOR GRANTING THE WRIT.

The right to attorneys' fees in a case of this character is determined by Tennessee law. **Cohen, Executrix v. Beneficial Industrial Loan Corporation**, 337 U. S. 531 (1949). Tennessee law is that fees can be paid only when a specific fund or property has been recovered. This is the holding of both **Southern v. Beeler, Atty.-Gen.**, 183 Tenn. 272 and **Grant v. Lookout Mountain Co.**, 93 Tenn. 691, the case which the Court of Appeals places in opposition to **Southern v. Beeler, Atty.-Gen.** These cases are not in conflict, as the Court of Appeals seemed to think. In **Grant**, the Court determined that the attorneys were entitled to a lien for fees upon the lands covered by deeds which were cancelled by the Court in a minority stockholders' suit to recover the property. But there the cancellation was by the Court, which said:

> "... this record shows that through the intervention of these minority stockholders, the property of the corporation has been preserved, protected, **and,**

indeed, recovered, after it had been illegally conveyed away" 93 Tenn. 691, 700. (Emphasis added.)

The Court further said, at page 700:

> "The record shows that this land had been conveyed away, and that, **by the decree, it was restored** to the company, and, if necessary, a writ of possession was ordered to issue. This was not the case merely of canceling a deed or removing a cloud, **but of absolute recovery.** The case comes within the rule laid down by this Court, that counsel are entitled to a **lien upon the fund recovered** by their clients for reasonable fees, and this lien attached to real estate when the subject of litigation." (Emphasis added.)

In the later case, **Southern v. Beeler, Atty.-Gen.,** 183 Tenn. 272, at page 301, the Tennessee Supreme Court cited **Grant** in holding that there must be a recovery of specific property from which fees can be paid. While recognizing "that counsel has rendered a great public service" the Court said:

> "The well nigh universal rule is that where counsel fees are awarded by the Court the fee allowed **must be paid out of a specific fund recovered,** or **out of specific property protected** against threatened loss, or it must rest in contract, either express or implied. The principle underlying the declaration of lien for counsel fees is that there has been a recovery of money or property in behalf of a plaintiff litigant". **Grant v. Lookout Mountain Co.,** supra; **Blackburn v. Clarke,** 85 Tenn. 506, 3 S. W. 505. (Emphasis added.)

Thus the Tennessee Supreme Court, in the more recent case on which petitioner here relies, cites its earlier decision in **Grant** for the proposition that there must be a recovery from which to pay counsel fees.

Yet the Sixth Circuit has relied on this case, and none other, as Tennessee authority for allowing fees more than five times over the amount recovered. Clearly even if there had been a "recovery" of Two Million Seven Hundred Thousand ($2,700,000.00) Dollars, in transactions outside of the Court, rather than a mere swapping of cash for securities of equal value, there could be no award of fees under Tennessee law. The fact that Two Million Seven Hundred Thousand ($2,700,000.00) Dollars was "involved" cannot alter the plain statements of the Tennessee decisions limiting the sources of fees to funds recovered.

The Sixth Circuit erred in failing to apply Tennessee law on another important point which was essential to its allowance of the fees: On the second appeal, that is, the instant proceeding pertaining to attorneys' fees, the Sixth Circuit held that "It cannot be said that the cancellation of the purchase of the Moore stock did not result from the action of the minority stockholders". Yet in the initial proceeding the District Court had held that the sale of the stock had been for bona fide business reasons and not an attempted compromise of pending litigation; that holding had been left undisturbed by the Sixth Circuit on the prior appeal, and nothing then said by it was inconsistent with that holding. Thus the earlier holding had become the "law of the case". As well stated in **United States v. Swift & Company**, 189 F. Supp. 885, 902 (N. D. Ill. E. D. 1960):

> "... Under the doctrine known as the law of the case, the unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit. See J. C. Millett Co. v. Distillers Distributing Corp., D. C. N. D. Cal. 1960, 183 F. Supp. 874. Orderly and consistent progress of the case requires that the parties

be precluded, with rare exceptions, from re-opening and re-arguing matters already decided".

Under Tennessee decisions the "law of the case" is treated as substantially equivalent to res adjudicata. The Tennessee Supreme Court has recently said that a question decided on a former appeal "whether rightly or wrongly decided, is res adjudicata", **Patrick v. Skinner**, 199 Tenn. 683 (1956). Other Tennessee cases holding in effect that the "law of the case" is practically equivalent to res adjudicata include:

Oliver v. State of Tennessee, 164 Tenn. 555 (1932);
Life & Casualty Ins. Co. v. Jett, 175 Tenn. 295, 299 (1939);
National Life & Accident Ins. Co. v. Morrison, 179 Tenn. 29, 41-42 (1942).

Had the present proceedings been in the Tennessee State Courts, plainly the finding that the Moore stock had been sold for business reasons would be controlling on the second appeal; jurisdiction here being based solely on diversity, the same result should follow. The later holding of the Court of Appeals, that the sale of the Moore stock was the result of the suit by minority stockholders, should be set aside, and the ultimate award of fees should be made consistent with the settled holding that the suit did not cause the sale of the stock.

We submit that the Court of Appeals has erroneously interpreted and applied Tennessee law, to the great detriment of the very corporation for whose aid these proceedings were originally purportedly commenced, and that the error should be corrected, and that the fees allowed should be payable only from the fund of Forty Thousand Eight Hundred ($40,800.00) Dollars actually recovered, and no other source.

CONCLUSION.

For the reasons stated above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX.

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed May 8, 1964, Carl W. Reuss, Clerk.)

No. 15491.

United States Court of Appeals
For the Sixth Circuit.

W. Raymond Denney, et al.,
Petitioners-Appellees,

v.

Phillips & Buttorff Corporation,
Respondent-Appellant.

On Appeal from the United States District Court for the Middle District of Tennessee.

Decided May 8, 1964.

Before: Cecil and Edwards, Circuit Judges, and McAllister, Senior Circuit Judge.

Per Curiam. This appeal involves an ancillary proceeding growing out of a stockholders' derivative action previously before this Court in **Maggiore v. Bradford**, 310 F. 2d 519. This appeal is from an order of the United States District Court for the Middle District of Tennessee allowing fees and expenses to the attorneys who represented the minority stockholders in the original action. In this action the attorneys are the petitioners-appellees and Phillips & Buttorff Corporation is the respondent-

appellant. We will refer to them as the petitioners and respondent, respectively.

The derivative action concerned the purchase by the respondent of 60,000 shares of stock, owned by the controlling stockholders, in Wm. R. Moore Dry Goods Company for $2,700,000. While the derivative action was pending and before it was assigned for trial, the officers and directors rescinded the purchase of the Moore stock. On the former appeal we held that the purchase of the stock, at least, constituted constructive fraud. On remand we instructed the District Court to require the defendants (officers and directors of the respondent) to pay to the respondent interest on $2,700,000 from the date of the commencement of the action to the date of rescission and to fix attorneys' fees for the petitioners. We held that the fact that the defendants rescinded the transaction before the court had an opportunity to pass upon the merits of the case would not defeat the right of counsel to compensation.

The trial judge entered judgment for interest in the sum of $40,800. Counsel for the respondent claim that this was the only fund recovered for the corporation. They further claim that under Tennessee law an allowance of attorneys' fees must be limited to an amount commensurate with this recovery. In support of this theory, counsel cite **Southern v. Beeler, Atty.-Gen.**, 183 Tenn. 272. More relevant to the issue in this case is **Grant v. Lookout Mountain Co.**, 93 Tenn. 691. There the court held that since the minority stockholders by their action had benefited the corporation, it was therefore responsible for proper and reasonable attorneys' fees. The court further determined that the attorneys were entitled to a lien for their fees upon the land conveyed by the deeds which were canceled by the action of the minority stockholders.

It cannot be said that the cancellation of the purchase of the Moore stock did not result from the action of the minority stockholders. Its cancellation inured to the benefit of the corporation by restoring $2,700,000 in assets in lieu of the Moore stock. After the rescission of the purchase of the Moore stock, or its resale, the trial judge entered an order impounding $270,000 of the corporation's funds out of which attorneys' fees might be paid. This order was made without prejudice to the contentions of any of the parties.

The court granted judgment in favor of the petitioners for $235,000 attorneys' fees and for $6,227.98 expenses. The trial judge found that the services were of vast proportions and that they were effective. He took into consideration the time spent by the lawyers, the complexity of the legal questions involved, the results accomplished, the professional standing of petitioners, and the professional standing of respondent's lawyers. He viewed the transaction in its entirely based upon all the facts in the case. The judge also took into account the public policy aspect to stockholders' derivative actions, i. e., that they serve a good purpose and should be encouraged rather than discouraged.

While the fees allowed may seem to be large, the trial judge was familiar with the litigation from its inception and with the work and accomplishments of the lawyers. Three prominent lawyers from the local bar of Nashville testified that in their opinion a reasonable fee would range from $270,000 to $350,000. No witnesses from the legal profession were offered on behalf of the respondent. We are unable to say that the amount allowed is excessive.

The judgment of the District Court is affirmed.